Filed 12/15/20 P. v. Kirincic CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY PAUL KIRINCIC, Defendant and Appellant.	A155291 (San Mateo County Super. Ct. No. 15NF001212A)

A jury convicted Anthony Kirincic of murdering Colleen Straw, a woman with whom he had a domestic relationship. Because he entered pleas of not guilty and not guilty by reason of insanity, Kirincic's trial was conducted in phases. (Pen. Code, § 1026; subsequent undesignated statutory references are to this code.) During the guilt phase, he was convicted of first degree murder with an enhancement for personally using a knife as a deadly weapon. (§§ 187 & 12022, subd. (b)(1).) At the sanity phase, the jury found Kirincic was sane when he committed his crime. The trial court imposed an aggregate sentence of 26 years to life in prison. On appeal, Kirincic contends his guilt and sanity verdicts must be reversed due to multiple jury instruction errors and that fines imposed on him at sentencing are unconstitutional. We reject these contentions and affirm the judgment.

BACKGROUND

I. Guilt Phase Evidence

A. Kirincic's Relationship With Straw

On July 27, 2015, San Mateo police responded to a call for assistance at Straw's home. Straw reported that she and her boyfriend, Kirincic, had an altercation the previous day when Kirincic came to retrieve some of his belongings. She stated that Kirincic attacked her and pushed her onto a couch. Officers did not observe physical injuries on Straw, but someone had forced the front door open, damaging the lock, door frame and drywall. A broken mirror was on the ground, and a broken hammer and wood chips were on the kitchen floor. An emergency protective order was issued but never served because police were unable to locate Kirincic.

On September 26, 2015, just after midnight, police responded to a report of a disturbance at Straw's house that possibly involved a firearm. Officers were setting up a perimeter when Straw came outside, crying and holding a bloody towel to her nose. She reported that she had been in her bedroom when Kirincic came in, started an argument and then attacked her. Straw said the argument had something to do with their breakup and that Kirincic blamed her for setting him up in some way. She reported that Kirincic hit her multiple times in the back of her head and once in her nose or face and also grabbed her throat while holding a pillow on her face. The police found a replica handgun in a backpack in Straw's house.

Later that morning, police found Kirincic at a bar two blocks from Straw's home. Kirincic reported that he and Straw had recently broken up after being together for about four months and that Straw was trying to arrange for someone to murder him. Kirincic said that when he went to Straw's house earlier that evening, she was acting crazy and they argued. He

admitted covering Straw's face with a pillow but did not indicate that he used force or held the pillow on her. He said the gun that the police found was not capable of firing, but he needed it for protection because people were after him or out to get him.

In October 2015, Kirincic pleaded guilty to a felony charge of committing corporal injury on a cohabitant during the September 26 altercation with Straw. (§ 273.5, subd. (a).) He was sentenced to three years' probation and four months in jail.

While Kirincic was in jail, he told his cellmate, Chris Carpenito, about the "crazy" relationship he had with Straw and admitted that he had assaulted her. Carpenito testified that Kirincic was "paranoid" that Straw was cheating on him and often talked about ways he could kill her, most of which were cartoonish. For example, he contemplated throwing a toaster in her bathtub. Carpenito thought Kirincic was entertaining and was "just talking crazy." Kirincic also talked about Straw with Vittorio Valdez, who was in an adjoining cell. He told Valdez his girlfriend was setting him up to have people drive by on motorcycles and kill him and said something like: " 'I'm going to get her before she gets me.' " Valdez just "waved" the comment off because he was dealing with his own problems, he thought Kirincic was "nuts," and he did not take him seriously.

On November 23, 2015, Kirincic was released from jail and placed on probation subject to a court order requiring him to stay away from Straw. A few hours after he was released, Kirincic went to see Straw. The following day, he started spending the night at Straw's house, where he stayed until the day she was murdered.

B. The Murder

On November 28, 2015, Straw had brunch with her family in San Francisco. Before her parents picked her up that morning, Straw drove Kirincic to El Camino Real Boulevard, gave him $20 and agreed to retrieve him later that day. Kirincic went to Taco Bell where he met Ronald Moredock, a transient homeless person. Kirincic told Moredock about gang violence in San Mateo and then mentioned that the girl he was going out with was involved with "gangsters" who were "bullying" him in some way. Kirincic said he was living with this girl, there had been parties with gangsters at her home, and the gangsters had tested him out. He also told Moredock that he had argued "pretty bad" with his girlfriend and had gone to jail for domestic violence. Kirincic said it was his girlfriend's fault that he had to go to jail because she would not stop screaming at him, so he had to put a pillow over her and then she called the police on him. He told Moredock he did not trust his girlfriend and thought she was cheating on him.

While Kirincic was talking to Moredock, a police officer on a motorcycle pulled up and stopped traffic at the intersection outside the Taco Bell. Seeing this, Kirincic removed a knife from his clothing and hid it in a flower box, telling Moredock he did not want to be caught with it. After the officer left, Kirincic retrieved his knife, removed it from its sheath and proudly displayed it for Moredock to see.

While Kirincic was at Taco Bell with Moredock, he called Straw and said he was ready to be picked up. During the conversation, he questioned Straw about who she was really with and what she was really doing. Straw arrived a short time later. Kirincic had invited Moredock back to the house for beers but Straw would not let him in the car. Kirincic started arguing and accusing Straw of cheating on him and lying to him. Moredock could see

they had "issues" and it "wasn't the time to be having company over." Straw told Kirincic to either get in the car or walk home. Kirincic shut the car door without getting in, Straw "peeled out," and Kirincic told Moredock, " 'I don't trust her.' "

Kirincic said he was going to walk to Straw's house, which was not far, and invited Moredock along. While they walked, Kirincic was "tripping a little," talking about his suspicions that Straw was seeing other men and that "guys [were] following him." He told Moredock that "if it came down to it," he would leave Straw, steal her car and "take off." He took out his phone, started playing "gangster rap" and "nonchalantly" said, " 'Maybe I'll just kill her and rape her and throw her in the back and steal her car.' " He also said something about chopping up Straw's body and throwing it in the back seat of the car. Moredock did not take these remarks seriously; he thought Kirincic was trying to act like a gangster, so he just played along.

While Kirincic and Moredock walked, they heard honking from a passing car. Assuming it was directed at him, Kirincic pulled out a hammer and said something like, " 'I got this hammer right here. I ain't even tripping.' " As the pair approached a liquor store, Moredock borrowed a few dollars from Kirincic to buy a "Four Loko." While they were outside the store, Kirincic asked if the shirt he was wearing under his jacket was "too blue" or the shade of blue that gangs wore. Moredock said it was, so Kirincic took off the shirt and threw it in the garbage.

As the two men approached Straw's house, Kirincic told Moredock to wait while he talked to Straw and he would whistle when Moredock could come to the porch. Moredock waited in a doorway, where he could see Kirincic and Straw talk on the porch. Eventually, Moredock heard a whistle and walked over. When Straw saw him, she became angry, swearing and

telling Kirincic he could not invite people over and Moredock was not coming inside. Kirincic argued back, telling Straw he was a man. She responded that he was not the man of the house and this was not going to happen. Kirincic was still playing rap music on his phone, which he put down on the railing and then said something like "fuck you, bitch." The argument grew louder and, eventually, they both went in the house. Moredock grabbed Kirincic's phone and took off.

At 12:10 p.m., Straw called 9-1-1 and reported that Kirincic had stabbed her and taken off in her car. Police arrived less than three minutes later and found Straw on the living room floor. She was nonresponsive, her clothes saturated with blood. A knife sheath and a hammer with Straw's blood on it were nearby. Kirincic's knife was by the front door. There were pools of blood in the house, primarily in the dining room and living room. Paramedics were unable to revive Straw, who was declared dead at the scene.

Meanwhile, at around 1:00 p.m., Kirincic struck another vehicle while driving Straw's car in a reckless manner. Kirincic drove away and the other driver followed, but lost sight of Kirincic when he pulled into a parking structure at a hospital complex.

C. Events after the Murder

The day after the stabbing, Police located Kirincic's phone in the possession of Moredock, who was near a Walnut Creek BART station. The browsing history on the phone showed that, on the day before Straw was killed, Kirincic consulted a website entitled "How to Commit the Perfect Murder. Top Documentary Films."

Two days after killing Straw, Kirincic rode a bicycle to his mother's house, where police were waiting and placed him under arrest.

An autopsy established Straw's cause of death was "multiple stab wounds and incised wounds." She also had multiple blunt force trauma contusions on her face, head and body.

D. Kirincic's Trial Testimony

Kirincic testified that a friend introduced him to Straw in 2015. He had just been released from a "program" and was looking for a place to live. Straw appreciated that he was trying to get his life together and offered to let him live at her house. While he stayed with Straw, Kirincic was careful to be aware of people around him and his surroundings. This was a practice that Kirincic adopted about three years before he met Straw, after he was stabbed and seriously injured while trying to help a friend who was being attacked.

Kirincic testified that when he was living with Straw, other people were always coming and going and he noticed many strange things. For example, when he and Straw drove places together, Hispanic people constantly followed them. At the house, he heard power tools and other noises that could not be explained. He noticed people sneaking into the yard, where there was a large pipe, and there were always gardeners around who did not do any work. Kirincic came to suspect there was a bunker under the house but when he asked Straw about it, she told him he was never to dig. Then Kirincic began receiving phone calls from strangers who threatened to kill him. When he told Straw about the threats, she claimed not to know what was going on but also said something might be going on. Kirincic developed suspicions about a man named Lopez, who claimed Straw was his girlfriend, and he confronted Lopez "on a regular basis." He also told his family he could not be around them because of threats on his life.

During his direct examination, Kirincic did not testify about violent altercations he had with Straw prior to her death. But he did claim that

after he was released from jail, he tried to avoid Straw. He testified that Straw kept calling him and eventually he agreed to a "quick" visit and then "ended up" going back to stay with her. Strange things continued to happen at Straw's house, according to Kirincic. He found some "weird" dolls at the house that were "blatant," threatening and completely overwhelming because they looked like him and other members of his family. Also, Straw's friend Lopez has said that he had access to bomb supplies, so on Thanksgiving Day Kirincic went to his mom's house while the family was out and searched for explosive devices. Kirincic spent the day after Thanksgiving with Straw and stayed at her house that night, but he barely slept because so many strange things were happening, and he was convinced his life was in danger.

Kirincic testified that when he was at Taco Bell on the morning of November 28, 2015, he "blatantly informed" Moredock about what was going on and said he did not want anybody around him. But Moredock seemed interested and wanted to see Straw's house. When Straw refused to let Moredock in her car, Kirincic assumed she did not want anybody else to see what was going on at her house. After they walked to the house and Straw still would not let Moredock come inside, Kirincic decided to drop the "petty" argument because he and Straw were in the middle of a "more deep-rooted argument" about "everything that had to do with what I believed was going on."

Kirincic testified that when he and Straw went in the house, he had a knife in his hand because it was his habit to check for intruders: "I had—like I always do, I had a weapon in my hand, and I was going to basically check the house to make sure there was nobody in there." Kirincic and Straw were still arguing, but he was not focused on her because he wanted to make sure nobody was in the house. He got no further than the living room when Straw

tried to disarm him by grabbing the knife but ended up grabbing the blade. Kirincic "panicked" and tried to "take control of the situation by stopping her because she was trying to attack" him.

Describing what happened next, Kirincic testified as follows: "We ended up on the ground somehow, and we were like wrestling. And during the course of that time, I don't know exactly specifics. I just know I thought by her trying to disarm me, that there was people in the back of the house and that she was trying to take the weapon out of my hand. [¶] So at that point, I just wanted to get out of there as fast as possible. I did not intend to even hurt her at all. I just wanted to get out of there as fast as possible. She had cut her hand. So obviously, it looked—it looked like it was a serious situation." The next thing Kirincic remembered was dropping his knife and running. He took Straw's car so he could get out of the area fast without being followed.

Under cross-examination, Kirincic acknowledged that when he met Straw, he was homeless and desperate for a place to live. During the time Kirincic lived with Straw, he did not work, pay rent or have his own car. Kirincic admitted Straw may have thought he was her boyfriend, but he did not view her as his girlfriend. When the prosecutor asked about the police reports Straw made in the summer and fall of 2015, Kirincic claimed that both altercations were about drugs. In July, Straw got mad when Kirincic showed up at her house with a female friend and refused to let them in until Kirincic put drugs through the mail slot. When she still would not open the door, he kicked it in so he could get his property. Straw started the fight that happened in September by telling Kirincic that if he did not give her all the drugs that she wanted she would call the police and report that he had a gun. Then Straw made sounds to make it appear that Kirincic was hitting her.

Kirincic acknowledged throwing a pillow at Straw but denied covering her face with it and did not remember giving her a bloody nose.

Kirincic admitted that when he was released from jail on November 23, 2015, he understood there was a court order requiring him to stay away from Straw. Kirincic violated the order because he believed the situation at Straw's house needed to be addressed, Straw had assured him she would get the restraining order lifted, and Straw's friend Lopez had indicated that he wanted to talk to Kirincic. From Kirincic's perspective, complying with the stay-away order was not more important than saving his own life.

Kirincic admitted that he showed Moredock his knife and hammer and he may have bragged about the knife. However, he denied ever telling Moredock he was going to kill Straw. After he and Moredock walked to Straw's house together, Straw said she wanted to talk inside the house, so he followed her in, assuming Moredock would just leave. Kirincic reiterated that he took his knife out as soon as he entered the house, but claimed he never took out his hammer, explaining that the hammer at the crime scene was not the one he had been carrying that day. When he walked through the house to make sure nobody was there, he carried the knife at his right side with the blade pointing forward. After he walked past Straw, she tried to take the knife away but grabbed the blade and cut herself. Straw had often seen him use his knife to check the house and had never tried to grab the knife before.

Kirincic testified that Straw "obviously didn't know what she was doing" when she grabbed the knife, so he tried to "calm" her down by giving her a "bear hug." But when they fell to the ground, and Straw began "trying to fight," Kirincic had this realization: "I thought from what I perceived from the way I was feeling was that the fact that she was trying to disarm me, she

had never done that before, and I thought that it could very well mean that there is somebody that she was trying to—that somebody was in the house. So like I said, I got up, dropped the weapon, and ran."

When the prosecutor asked whether Kirincic stabbed Straw multiple times, he responded, "Like I said, we fought on the ground and wrestled. The whole time, I had the knife in my hand. But I wasn't trying intentionally to stab her." Kirincic testified that he did not think Straw was trying to attack him, but he also stated that "she was trying to punch me, and I bear hugged her." Kirincic did not recall punching Straw in the face but he acknowledged it "[c]ould very well be possible." When asked if he put his hand around Straw's neck, Kirincic testified that "[a]nything [is] possible." When the prosecutor pressed Kirincic to be specific about what happened, Kirincic testified that when Straw grabbed his knife in the middle of a "heated argument," the situation got "even more crazy," and he was "in shock" that she had done that. He tried to calm her down but "at the same time," he was "in fear of [his] life," so he decided to protect himself by running away.

According to Kirincic, Straw needed calming down because she went into a rage after cutting her hand. He claimed not to remember how she cut her other hand or got any of the other stab wounds but conceded that he "[a]pparently" did "unintentionally" stab Straw in the chest albeit without realizing what was happening. Kirincic eventually admitted noticing that "the knife had cut" Straw near her collarbone. Then he got up and ran, not noticing Straw's other injuries, but thinking only that he was about to die if he did not get away.

E. Other Defense Witnesses

Kirincic's mother, Tracy, testified that when Kirincic was in high school he struggled with emotional and behavior problems and started abusing

marijuana. His problems became more serious after he was injured in a knife attack and was overprescribed pain medication. After that, the goal was always to get Kirincic clean and sober, but Tracy did not have the resources to get him the help he needed.

Tracy testified that when Kirincic was in jail for abusing Straw, they made a plan to get him into a program while he was still sober. Tracy arranged for Kirincic to be released on the Monday before Thanksgiving and brought him to her house. That night, he went out against her wishes. The next day, Tracy was at work when Kirincic called in a frantic state, afraid somebody was trying to get him to commit suicide. That night he told Tracy he could not come home because he was afraid for his life, Tracy's life, and his sisters' lives. As the week went on, Kirincic became more afraid and frantic. On Wednesday, he gave his sister a statue that he thought was a doll meant to represent him. On Thursday, he went to Tracy's house while the family was out and cut the speaker wires. On Saturday, the police contacted Tracy about the incident at Straw's house. The next time she heard from Kirincic she told him he had to come home, which he did.

Under cross-examination, Tracy acknowledged Kirincic has "significant addiction issues," which include abusing heroin, methamphetamine and prescription medications. Dishonesty is a "hallmark" of Kirincic's addiction and an ongoing problem since he was a teenager; he has lied to Tracy many times about big and small things. As an adult, Kirincic would get himself out of trouble by checking into a program but had been asked to leave many programs for breaking the rules.

Dr. George Bach-y-Rita, who was retained by the defense to evaluate Kirincic, testified as an expert in the field of psychiatry and neurology. In Bach-y-Rita's opinion, Kirincic "has schizophrenia of the paranoid type." He

based this opinion on evidence that Kirincic experienced delusions that were "consistent over a period of a good long time and were occurring in the absence of drugs, of street drugs." Bach-y-Rita testified that people with paranoid schizophrenia who think somebody is going to hurt them do what they can to keep from getting hurt. Bach-y-Rita has treated other male prisoners with this condition who killed because they thought they were going to get killed.

F. Rebuttal Witnesses

Dr. Ronald Roberts is a neuropsychologist who testified as an expert in forensic psychology. In November 2016, Roberts evaluated Kirincic and concluded that he suffers from two conditions, both of which were present when he killed Straw: an antisocial personality disorder; and a substance/medication-induced psychotic disorder. People who suffer from an antisocial disorder display three or more of a set of defined characteristics that include failing to conform to social norms, failing to conform to lawful behavior, deceit, dishonesty, aggression, irresponsibility, recklessness and lack of remorse. A substance or medication-induced disorder is "not caused by mental health problems," but results from medications or illegal drugs that cause psychotic problems.

Roberts has experience working with people who suffer from schizophrenia of a paranoid type. Although rare, paranoid schizophrenia is not difficult to diagnose based on typical behaviors, which include lack of eye contact, losing one's train of thought, becoming confused and inability to communicate. Roberts has never known anyone with schizophrenia who was able to complete the tests Kirincic completed successfully when Roberts evaluated him. Nor do Kirincic's medical records contain evidence that he suffers from or has ever been treated for schizophrenia. Roberts also testified

about the significance of the fact that Kirincic was not exhibiting symptoms of this condition at the time of trial: "Schizophrenia is a very distinct and easily-observable diagnosis. People do not recover from schizophrenia. You require ongoing use of medication. [¶] At present, Mr. Kirincic, if he were schizophrenic, couldn't be sitting there comfortably like he is right now in court."

Dr. Akhil Mehra is a psychiatrist who treats inmates at correctional facilities in San Mateo County. Between October 2015 and October 2017, Mehra met with Kirincic ten times for purposes of treatment. During those sessions, Kirincic did not display any signs that he was experiencing delusions or paranoia. Nor did Mehra observe in Kirincic symptoms consistent with paranoid schizophrenia.

II. Sanity Phase Evidence

During the sanity phase of Kirincic's trial, Dr. Bach-y-Rita and Dr. Roberts supplemented opinions they offered during the guilt trial. In addition, the prosecutor elicited testimony from Dr. David Berke, another expert in the field of forensic psychology.

Dr. Bach-y-Rita testified he was "still convinced" Kirincic suffers from "paranoid schizophrenia paranoid type." He believed this diagnosis was consistent with the results of an "MMPI" test administered by Dr. Roberts and with medical records showing that Kirincic has previously been diagnosed with a psychosis that was "[n]ot otherwise specified." Bach-y-Rita also found support for his diagnosis in guilt-phase evidence showing that, on the day of the murder, Kirincic "was talking paranoid to Moredock," and that Kirincic's behavior during and after the stabbing fit together with the paranoia that he expressed to Moredock.

Bach-y-Rita testified that because Kirincic suffers from paranoid schizophrenia, he did not understand the nature or quality of the acts that caused Straw's death. Somebody functioning under the "intense fear" Kirincic was experiencing is "not rational" or "capable of reasoning." In this doctor's opinion, Kirincic "was not rational in evaluating" the situation in Straw's home on the day of the murder, "or the situations leading up to it, believing that people were going to kill him . . . [t]hat people were following him, that people were listening to him. This is just not rational thought. This is paranoia."

Dr. Roberts testified that when he evaluated Kirincic in 2016, he concluded that Kirincic was legally sane when he killed Straw. Roberts based this conclusion on evidence that Kirincic was "capable of engaging in conscious, goal-directed behaviors," that he recognized his own behaviors were inappropriate, and that his decisions were indicative of "control and planning."

Dr. Berke testified that he was appointed by the court to determine whether Kirincic met the criteria for being deemed not guilty by reason of insanity of the charged murder. Berke diagnosed Kirincic with a "substance-induced psychosis." In Berke's opinion, Kirincic has never suffered from paranoid schizophrenia. Berke also offered the opinion that Kirincic was legally sane when he killed Straw. As Berke explained, "[i]n terms of the law and the definition of not guilty by reason of insanity law, I felt that in spite of some delusional thinking that [Kirincic] was engaged in at the time of the crime, he nonetheless knew what he was doing when the victim was stabbed."

DISCUSSION

I. The Domestic Violence Propensity Evidence Instruction

Kirincic first contends the trial court committed constitutional error by using CALCRIM No. 852A to instruct the jury regarding evidence of Kirincic's prior domestic violence against Straw. The relevant part of this instruction states:

"You may consider [defendant's prior acts of domestic violence] only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit [homicide]. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of [homicide]. The People must still prove each charge and allegation beyond a reasonable doubt."

In framing his challenge to this instruction, Kirincic does not dispute that evidence of past instances of domestic violence was admissible under Evidence Code section 1109, which codifies "the Legislature's determination that in domestic violence cases, similar prior offenses are uniquely probative of a defendant's guilt on a later occasion." (*People v. Merchant* (2019) 40

Cal.App.5th 1179, 1192; see also *People v. Johnson* (2010) 185 Cal.App.4th 520, 532.) Nor does he dispute that the preponderance of the evidence standard of proof applies to this type of uncharged conduct evidence. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 380–383.) Instead, Kirincic contends CALCRIM No. 852A violates due process by inviting the jury to convict a defendant of a charged crime based on evidence that was proven only by a preponderance of evidence rather than beyond a reasonable doubt.

We address this claim despite the fact that it was not made below because the alleged constitutional violation implicates Kirincic's substantial rights. (§ 1259.) Applying our de novo standard of review, we consider the challenged instruction " 'in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner.' " (*People v. Mitchell* (2019) 7 Cal.5th 561, 579.)

We find no reasonable likelihood that the jury construed CALCRIM No. 852A as relieving the prosecution of its burden of proving guilt beyond a reasonable doubt. By its clear terms, CALCRIM No. 852A instructs the jury that the preponderance-of-the-evidence standard applies only to domestic violence propensity evidence. It permits but does not require the jury to infer that the defendant was predisposed to commit the charged crime if the jury finds by a preponderance of the evidence that the defendant committed uncharged domestic violence. It admonishes that a finding of prior domestic violence is not sufficient by itself to prove the defendant guilty of the charged crime; such a finding, should it be made, is only one factor to be considered with the other evidence. And this instruction clearly states that the prosecution "must still prove each charge and allegation beyond a reasonable doubt."

Nor does CALCRIM No. 852A contain language that could be construed reasonably as canceling out other instructions that expressly address the prosecutor's burden of proving the defendant guilty beyond a reasonable doubt. In Kirincic's case, correct instruction regarding that burden was incorporated into multiple other instructions, including the pattern instructions that were used to explain the elements of murder (CALCRIM No. 520), the lesser offense of involuntary manslaughter (CALCRIM No. 580), and the deadly weapon enhancement allegation (CALCRIM No. 983). Thus, the instructions considered as a whole did not lower the prosecution's burden of proving Kirincic's guilt beyond a reasonable doubt.

Our conclusions are supported by numerous other cases rejecting similar due process challenges to propensity-evidence jury instructions that permit consideration of uncharged conduct proven by a preponderance of the evidence. (See *People v. Reyes* (2008) 160 Cal.App.4th 246, 251–253 [former CALCRIM No. 852]; *People v. Merchant*, *supra,* 40 Cal.App.5th at pp. 1194–1195 [same]; see also *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [former CALJIC No. 2.50.01, sexual offense propensity evidence]; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1106 [CALJIC No. 2.50, other crimes evidence].)

Kirincic posits that he has identified a new problem with CALCRIM No. 852A that has not been previously considered by the courts. According to this theory, the unconstitutional effect of CALCRIM No. 852A becomes apparent only when it is considered in conjunction with CALCRIM No. 220, which explains the presumption of innocence and the People's burden of proving the defendant guilty beyond a reasonable doubt. Specifically, Kirincic relies on the following language in CALCRIM No. 220: "Whenever I tell you the People must prove something, I mean they must prove it beyond

a reasonable doubt unless I specifically tell you otherwise." Kirincic argues that the jury could well have interpreted CALCRIM No. 852A as an "unless I specifically tell you otherwise" instruction and thus convicted him of murder based on evidence of uncharged domestic violence that had only been proven by a preponderance of the evidence.

Kirincic's theory is not new but conflates two issues that have been settled against him. First, CALCRIM No. 852A is an "unless I specifically tell you otherwise" instruction, in the sense that uncharged acts of domestic violence may be considered by the jury if they are proven by a preponderance of the evidence. However, CALCRIM No. 852A does not permit the jury to base a conviction on this uncharged conduct; it instructs instead that the uncharged domestic violence "is not sufficient by itself to prove that the defendant is guilty" of the charged offense, and that the "People must still prove each charge and allegation beyond a reasonable doubt." Our Supreme Court has held that parallel language "adequately confines the weight and significance of uncharged offenses within constitutional bounds." (*People v. Reliford, supra,* 29 Cal.4th at p. 1014.)

The second part of Kirincic's argument is that an instruction regarding the preponderance standard of proof applicable to domestic violence propensity evidence will unintentionally mislead the jury to believe that a charged offense need be proven by only a preponderance of the evidence. Courts have repeatedly rejected analogous claims involving propensity evidence jury instructions that track the relevant language in CALCRIM No. 852A, which adequately distinguishes the two proof standards and explains how each is to be applied. (See *People v. Reyes, supra*, 160 Cal.App.4th at p. 251–253.) Thus, we follow settled authority in rejecting this constitutional challenge to CALCRIM No. 852A.

II. Failure to Instruct On Voluntary Manslaughter

Kirincic next contends the trial court erred by denying his request to instruct the jury regarding the lesser included offense of voluntary manslaughter, based on theories of imperfect self-defense and sudden quarrel or heat of passion. "It is error for a trial court not to instruct on a lesser included offense when the evidence raises a question whether all of the elements of the charged offense were present, and the question is substantial enough to merit consideration by the jury." (*People v. Booker* (2011) 51 Cal.4th 141, 181 (*Booker*).) "On appeal, we review independently whether the trial court erred in failing to instruct on a lesser included offense." (*Ibid.*)

When reviewing the denial of a request for a jury instruction, doubts as to the sufficiency of the evidence to support the instruction are resolved in favor of the accused. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.) Thus, for example, we will not weigh the credibility of witnesses. (*Ibid.*) And, we focus on matters that could justify the instruction rather than the "customary summary of evidence supporting the judgment." (*People v. King* (1978) 22 Cal.3d 12, 15–16.) We are mindful, however, that when "evidence is 'minimal and insubstantial,' " trial courts "need not instruct on its effect." (*People v. Duckett* (1984) 162 Cal.App.3d 1115, 1124–1125.) As our Supreme Court has cautioned "unsupported theories should not be presented to the jury" and "[t]rial courts have the duty to screen out invalid theories of conviction, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.)

A. Imperfect Self-Defense

"Imperfect self-defense is the actual, but unreasonable, belief in the need to resort to self-defense to protect oneself from imminent peril. [Citations.] When imperfect self-defense applies, it reduces a homicide from

murder to voluntary manslaughter because the killing lacks malice aforethought." (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178.) "A person who actually believes in the need for self-defense necessarily believes he is acting lawfully." (*In re Christian S.* (1994) 7 Cal.4th 768, 778.) Thus, "[w]hen the trier of fact finds that a defendant killed another person because the defendant actually but unreasonably believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and cannot be convicted of murder." (*Id.* at p. 783.)

Kirincic contends his trial testimony constitutes substantial evidence supportive of an unreasonable self-defense instruction. We disagree. During his testimony, Kirincic toggled between two inconsistent if not contradictory explanations about how Straw was killed. Parts of Kirincic's testimony described an accidental killing: Kirincic was wielding a knife while checking for intruders when Straw accidentally injured herself; Kirincic tried to calm her down and accidentally inflicted additional injuries that caused her death. Construed favorably to the defense, this testimony may have supported a finding that Straw's death resulted from Kirincic's criminally negligent brandishing of a deadly weapon. In light of this evidence, the jury was instructed on involuntary manslaughter. But evidence of an accidental killing is inconsistent with a finding that Kirincic harbored an actual unreasonable belief in the need to defend himself by killing Straw.

Another scenario suggested by Kirincic's testimony is that the killing was Kirincic's reaction to unspecified existential threats that made him fear for his life—threats posed by persons other than Straw. Under this version of the incident, Kirincic's perceived need to kill Straw was purely delusional, a reaction to the imagined presence of people who were not there. Evidence that Kirincic killed Straw because he was reacting to a delusion did not

entitle him to a voluntary manslaughter instruction based on a theory of imperfect self-defense. (*People v. Elmore* (2014) 59 Cal.4th 121, 134 (*Elmore*); see also *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1456.)

In *Elmore,* a defendant convicted of the first degree murder of a person he stabbed at a bus stop argued on appeal that the trial court erroneously denied his request to instruct the jury on unreasonable self-defense voluntary manslaughter. (*Elmore, supra*, 59 Cal.4th at pp. 130, 132.) Affirming the ruling, the court of appeal rejected the defendant's theory that unreasonable self-defense does not require factual support but can be based "solely on a defendant's delusional mental state." (*Id*. at p. 132.) The Supreme Court granted review and also affirmed the ruling. The *Elmore* court explained that "[a] defendant who makes a factual mistake misperceives the objective circumstances," but a "delusional defendant holds a belief that is divorced from the circumstances," and "[u]nreasonable self-defense was never intended to encompass reactions to threats that exist only in the defendant's mind." (*Id*. at pp. 136 & 137.) Thus, while a defendant may rely on evidence of mental illness to show that he did not act with malice, "a belief in the need for self-defense that is purely delusion is a paradigmatic example of legal insanity," which is an issue reserved for the sanity phase of trial. (*Id*. at p. 135.)

Kirincic contends that *Elmore* does not support the trial court's ruling in this case because, aside from his delusions, there was also substantial evidence that he "misinterpreted the objective circumstance of [Straw] grabbing the knife as a threat to harm or kill him."

Under direct examination, Kirincic did testify that when Straw grabbed the knife blade, he thought she was trying to "attack" him. But Kirincic's response to this perceived attack was not to stab or kill Straw. Rather, in

Kirincic's words, he tried to "take control . . . by stopping her." Kirincic explained that he had this response because he suspected other people may have been in the house and he just wanted to get away as fast as he could. Indeed, Kirincic testified explicitly that "I did not intend to even hurt her at all."

Under cross-examination, Kirincic refined his testimony about how he reacted when Straw tried to take the knife. Explaining that Straw "obviously didn't know what she was doing," Kirincic testified that he tried to "calm" Straw down by giving her a "bear hug." Then they fell to the ground, and Straw started "trying to fight" him. Again though, Kirincic did not claim that he felt threatened by Straw. He testified that while he and Straw were struggling on the ground, he realized that his life was in danger because somebody *other than Straw* was in the house. This realization caused Kirincic to keep the knife in his hand "the whole time," and triggered a series of acts by him that he had trouble recalling at trial.

Throughout his testimony, Kirincic denied that he intended to stab Straw. But he also admitted that he could not remember what he had done to her: whether he punched her; whether he choked her; or how many times he unintentionally stabbed her. In the end, Kirincic claimed not to even have noticed Straw's injuries or considered her wellbeing because he was too afraid that he was going to die if he did not get away from the house. Thus Kirincic did not testify or intimate that he misperceived Straw's act of grabbing the knife blade as an attempt on his own life. Instead, Kirincic defended his conduct as a genuine response to his delusion that somebody else who wanted to kill him was in the house.

Because there is no substantial evidence Kirincic harbored an actual but unreasonable belief that Straw was threatening his life, his request for

an unreasonable self-defense instruction was properly denied. (See *Booker, supra*, 51 Cal.4th at p. 183 [defendant's testimony consisting of "contradictory accounts" of how he stabbed victim "simply was not substantial enough to merit the requested jury instruction"].)

B. Heat of Passion

"Heat of passion is one of the mental states that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter." (*People v. Nelson* (2016) 1 Cal.5th 513, 538.) Jury instruction regarding the heat of passion theory of voluntary manslaughter is required when there is substantial evidence that " 'the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' " (*People v. Barton* (1995) 12 Cal.4th 186, 201 (*Barton*).)

Kirincic argues he was entitled to a heat of passion instruction based on evidence that he killed Straw because she "unexpectedly and without notice grabbed the knife blade when, in the past, she had previously seen him produce a knife to check the house" and had not reacted by trying to grab it away from him. We reject this argument.

"A heat of passion theory of manslaughter has both an objective and a subjective component." (*People v. Moye* (2009) 47 Cal.4th 537, 549.) The objective component requires proof that the killing was a reaction to provocation " 'that would cause an emotion so intense that an ordinary person would simply react, without reflection.' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1225, italics omitted.) The subjective element requires proof that the defendant killed "while under 'the actual influence of a strong passion' induced by such provocation." (*Moye,* at p. 550.)

Kirincic's testimony that Straw's act of grabbing the knife was sudden and shocking is not substantial evidence of "legally sufficient provocation" that would cause an ordinary person to kill without reflection. (*People v. Nelson*, *supra*, 1 Cal.5th at p. 539; *People v. Rangel, supra*, 62 Cal.4th at p. 1225.) Indeed, Kirincic himself acknowledged that it was immediately apparent that Straw injured only herself by grabbing the knife. He also testified unequivocally that he retained possession of the knife "[t]he whole time." Even if we could find evidence for characterizing Straw's conduct as provocation, Kirincic did not testify that the killing was an immediate, emotional reaction to Straw's act of grabbing the knife. He testified that he tried to calm Straw down, that he gave her a bear hug, and that he never intended to hurt her. And in any event, no "ordinarily reasonable person of average disposition" would have reacted to Straw grabbing at the knife by fatally stabbing her as Kirincic did. (See *Barton*, *supra*, 12 Cal.4th at p. 201)

III. Instruction Regarding Kirincic's Mental Disorder

At the request of the defense, the trial court used CALCRIM No. 3428 to instruct the jury how evidence of Kirincic's mental illness related to the intent element of murder. The instruction stated, in relevant part: "You have heard evidence that the defendant may have suffered from a mental disease, defect, or disorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent or mental state, specifically: premeditation, deliberation, and/or malice aforethought (intent to kill)."

On appeal, Kirincic contends the trial court committed two errors by using CALCRIM No. 3428. First, he argues that the court violated a duty to

instruct the jury that Kirincic's mental illness was also relevant to an assessment of his credibility as a witness. Kirincic contends this instructional duty arises from authority recognizing that the "mental illness or emotional instability of a witness can be relevant on the issue of credibility" to the extent "such illness affects the witness's ability to perceive, recall or describe the events in question." (*People v. Gurule* (2002) 28 Cal.4th 557, 591–592 (*Gurule*).) But *Gurule* made this observation in a different context that had nothing to do with an alleged jury instruction error.

Jury instruction regarding the significance of a defendant's mental disorder is a "pinpoint" instruction that the trial court has no obligation to give absent a request from the defendant. (*People v. Ervin* (2000) 22 Cal.4th 48, 90–91; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Thus, for example, "CALCRIM No. 3428 is a pinpoint instruction that must be given only if requested by the defendant, and only if substantial evidence supports the defense theory that defendant's mental disease or disorder affected the formation of the relevant intent or mental state." (*People v. Larsen* (2012) 205 Cal.App.4th 810, 824.) In the present case, the defense requested CALCRIM No. 3428, which was given. But it did not request supplemental instruction or a modification of the CALCRIM instruction to specifically address the impact of Kirincic's mental illness on the jury's assessment of his credibility. Because that distinct issue "does not involve a 'general principle of law' as that term is used in the cases that have imposed a sua sponte duty of instruction on the trial court," (*Saille*, at p. 1120), the trial court did not err by failing to instruct sua sponte on the matter.

Kirincic's second argument is that CALCRIM No. 3428 violates California law by affirmatively preventing the jury from considering a defendant's mental illness for purposes of assessing his credibility as a

witness. Because Kirincic did not object to CALCRIM No. 3428 in the trial court, this claim is forfeited "unless the error affects [his] substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) Kirincic contends his substantial rights were affected because his credibility was put at issue when he elected to testify at trial. Kirincic acknowledges that evidence of his mental illness could have damaged his credibility to the extent it impaired his ability to accurately perceive, recall or describe the pertinent events (see *Gurule*, *supra* 28 Cal.4th at pp. 591–592), yet he argues here it damaged his credibility that the jury could *not* consider his mental illness because mental illness would have provided an alternative explanation—other than consciousness of guilt—for his false statements about the crime. We are not persuaded that casting doubt on Kirincic's credibility in this manner would have somehow made him more credible, or better protected his substantial rights.

Nor does Kirincic account for the fact that the defense requested CALCRIM No. 3428 without substantive modification. "The doctrine of invited error bars a defendant from challenging a jury instruction given by the trial court when the defendant has requested the instruction based on a ' " ' "conscious and deliberate tactical choice." ' " ' " (*People v. DeHoyos* (2013) 57 Cal.4th 79, 138.) CALCRIM No. 3428 is a pinpoint instruction relating the defendant's evidence of mental illness to the intent element of a charged offense. By requesting the instruction here, defense counsel secured a legal basis for arguing that Kirincic was unable to form the intent required to commit murder. And, by requesting this instruction without modification, defense counsel avoided drawing unfavorable attention to evidence suggesting Kirincic's mental illness undermined his credibility as a witness.

Even if we were to reach the merits, Kirincic fails to substantiate his claim that CALCRIM No. 3428 violates California law. He challenges the instruction on the ground that it admits evidence of a defendant's mental illness for the limited purpose of deciding whether the defendant acted with the intent required to commit the charged offense. This restriction on the use of mental illness evidence has been in place since California abolished the diminished capacity defense. "At a trial on the issue of guilt, '[e]vidence of mental disease, mental defect, or mental disorder is admissible *solely on the issue* of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.' " (*People v. Mills* (2012) 55 Cal.4th 663, 671 (italics added); see also § 28, subd. (a); *People v. Saille, supra*, 54 Cal.3d at pp. 1115–1117.)

Kirincic contends that *People v. McGehee* (2016) 246 Cal.App.4th 1190 (*McGehee*) holds that CALCRIM No. 3428 "violates California law and requires reversal" of the judgment. *McGehee* involved a mentally disturbed defendant who was convicted of second degree murder for stabbing his mother to death with a kitchen knife. One issue on appeal was whether the trial court erred by instructing the jury with "CALCRIM No. 362 on consciousness of guilt along with CALCRIM No. 3428 on the limited use of evidence of mental impairment." (*McGehee*, at p. 1194.) The defendant argued that the trial court should have modified CALCRIM No. 3428 to permit the jury to consider evidence of his mental illness for purposes of assessing his consciousness of guilt, which consisted of false statements the defendant made the day after the murder. (*McGehee*, at p. 1204.) The *McGehee* court agreed that evidence of the defendant's mental illness was probative of his consciousness of guilt because his mental impairment may

have prevented him from knowing that his statements were false. (*Id*. at p. 1205.) However, the court went on to find that the error was harmless and did not affect the defendant's substantial rights. Thus, the defendant forfeited his claim of error because he had not made any objection to the relevant instructions in the trial court. (*Id*. at pp. 1206–1207.)

McGehee does not hold that CALCRIM No. 3428 violates California law. It holds that the pattern instruction may require modification if statements that a mentally ill defendant made after committing a crime are offered as proof of his consciousness of guilt. This principle does not translate well to the context of assessing the defendant's credibility as a witness. A pinpoint instruction expressly telling the jury to consider whether Kirincic's mental illness impacted his credibility would appear to harm rather than benefit the defense. Because such an instruction could have undermined Kirincic's credibility, defense counsel had a strong tactical reason for requesting CALCRIM No. 3428 without modification. Under these circumstances, the trial court had no sua sponte obligation to modify the instruction to address the distinct issue of how to assess witness credibility, which was covered by another adequate instruction, CALCRIM No. 226 ["In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony"].

Kirincic also completely ignores that the instructional error in *McGehee* was held to have not affected the defendant's substantial rights. (*McGehee, supra*, 246 Cal.App.4th at pp. 1206–1207.) Like the *McGehee* defendant, Kirincic did not object to CALCRIM No. 3428 in the trial court. Thus, even if we could be persuaded that a *McGehee*-type error occurred here, the claim is forfeited.

IV. Instruction Regarding Kirincic's Sanity Defense

Kirincic contends the finding that he was sane when he murdered Straw must be reversed because the trial court failed to instruct the jury that unreasonable self-defense is a form of insanity.

A. Additional Background

When, as here, a criminal defendant pleads both not guilty and not guilty by reason of insanity, the trial is bifurcated. In the guilt phase, the defendant is conclusively presumed to have been legally sane at the time of the offense. (§ 1026, subd. (a); *Elmore, supra*, 59 Cal.4th at pp. 140–141.) If the defendant is found guilty, the trial proceeds to the sanity phase, in which the defendant has the burden to prove "by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (b); see § 1026, subd. (a); *Elmore, supra*, 59 Cal.4th at p. 141.)

In this case, the trial court used CALCRIM No. 3450 to instruct the jury regarding the elements of Kirincic's insanity defense. The instruction stated:

"You have found the defendant guilty of murder. Now you must decide whether he was legally insane when he committed the crime. [¶] The defendant must prove that it is more likely than not that he was legally insane when he committed the crime[].

"The defendant was legally insane if: [¶] 1. When he committed the crime, he[] had a mental disease or defect; [¶] AND [¶] 2. Because of that disease or defect, he was incapable of knowing or understanding the nature and quality of his act or was incapable of knowing or understanding that his act was morally or legally wrong.

"Do not base a finding of not guilty by reason of insanity solely on the basis of a personality disorder, adjustment disorder, seizure disorder, or an abnormality of personality or character made apparent only by a series of criminal or antisocial acts.

"If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, that settled mental disease or defect combined with another mental disease or defect may qualify as legal insanity. *A settled mental disease or defect* is one that remains after the effect of the drugs or intoxicants has worn off.

"You may consider any evidence that the defendant had a mental disease or defect before the commission of the crime. If you are satisfied that he had a mental disease or defect before he committed the crime, you may conclude that he suffered from that same condition when he committed the crime. You must still decide whether that mental disease or defect constitutes legal insanity.

"If you find the defendant was legally insane at the time of his crime[], he will not be released from custody until a court finds he qualifies for release under California law. Until that time he will remain in a mental hospital or outpatient treatment program, if appropriate. He may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for his crime. If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide whether the defendant was legally sane or insane at the time of the crime. You must not speculate as to whether he is currently sane or may be found sane in the future. You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way.

"You may find that at times the defendant was legally sane and at other times was legally insane. You must determine whether he was legally insane when he committed the crime.

"If, after considering all the evidence, all twelve of you conclude the defendant has proved that it is more likely than not that he was legally insane when he committed the crime, you must return a verdict of not guilty by reason of insanity."

B. Analysis

Kirincic contends that CALCRIM No. 3450 is inadequate because it does not "mention unreasonable self-defense" or instruct the jury that a person is legally insane when the "act of killing is based on 'pure delusion' unreasonable self-defense." The omission was prejudicial error, Kirincic argues, because it deprived him of a valid insanity defense that was expressly sanctioned by our Supreme Court in *Elmore, supra*, 59 Cal.4th at p. 134.

Kirincic forfeited this claim by failing to raise it in the trial court. (*People v. McCarrick* (2016) 6 Cal.App.5th 227, 250.) " '[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' " (*People v. Jones* (2013) 57 Cal.4th 899, 969–970; see also *People v. Andrews* (1989) 49 Cal.3d 200, 218.)

Kirincic attempts to avoid forfeiture by characterizing the concept of " 'pure delusion' unreasonable self-defense" as a general principle of sanity/insanity law, which triggers a sua sponte instructional duty. Kirincic cites no authority imposing such a duty and fails to articulate a sound basis for this court to find one in the first instance. We are not persuaded by Kirincic's contention that *Elmore, supra*, 59 Cal.4th 121, articulates a new legal principle that must be incorporated into sanity phase jury instructions.

While *Elmore* addressed the trial court's duty to instruct on general principles of law, the issue was whether to instruct on voluntary manslaughter as a lesser included offense of murder. (*Ibid.*)

As discussed earlier in this opinion, *Elmore* affirmed a trial court's decision not to instruct on unreasonable self-defense voluntary manslaughter because the instruction was not supported by factual evidence. (*Elmore, supra*, 59 Cal.4th at p. 132.) In this context, the court explained that purely delusional conduct is not evidence of a lack of malice but may be evidence of insanity. While the court did recognize that evidence of purely delusional conduct is admissible at the sanity phase of a criminal trial, it did not impose a new obligation on trial courts to explain how such case-specific evidence relates to the legal concept of insanity. Indeed, that question was not before the court. However, other settled authority indicates that courts have no sua sponte obligation to give an instruction that pinpoints a defense theory of the case. (See e.g. *People v. Nelson*, *supra,* 1 Cal.5th at pp. 541–542.)

Insisting that *Elmore* announced a new principle of sanity/insanity law by stating that "[a] belief in the need for self-defense that is purely delusional is a paradigmatic example of legal insanity," (*Elmore, supra,* 59 Cal.4th at p. 135), Kirincic posits that the trial court deprived him of a plausible defense by failing to instruct the jury about it. The quoted statement is part of the *Elmore* court's explanation for why evidence of purely delusional behavior is inadmissible to prove the defendant lacked malice aforethought. Because such evidence is not grounded in factual reality, it cannot be used to secure a voluntary manslaughter instruction based on the theory of unreasonable self-defense, but it can be used later by the defendant to support an insanity defense. Indeed, that is exactly what happened here. Dr. Bach-y-Rita testified that Kirincic did not understand the nature of his conduct or that

killing Straw was wrong because he was consumed by delusions. Kirincic was not precluded from presenting this factual theory to the jury, but had no right to a sua sponte jury instruction pinpointing the theory.

V. Sentencing

At sentencing, Kirincic was ordered to pay direct victim restitution in the amount of $8,500. The trial court also imposed the following fines and fees: a $10,000 restitution fine (§ 1202.4, subd. (b)); a $10,000 parole revocation restitution fine, which was stayed (§ 1202.45); a $40 court operations assessment fee (§ 1465.8); and a $30 criminal conviction fee (Gov. Code, § 70373).

On appeal, Kirincic contends his due process rights were violated because the trial court did not find that Kirincic had the ability to pay the restitution fine and two court assessment fees. Kirincic posits, without analysis, that ability-to-pay findings were constitutionally compelled under the holding of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), a case that was decided after his sentence was imposed. The record shows that Kirincic did not dispute his ability to pay his restitution fine or the court fees, thus forfeiting the issue for purposes of appeal. (See *People v. McCullough* (2013) 56 Cal.4th 589, 596–597; *People v. Nelson* (2011) 51 Cal.4th 198, 227 *People v. Avila* (2009) 46 Cal.4th 680, 729.)

A defendant's "inability to pay" is a statutory factor for the trial court to consider before imposing a restitution fine in excess of $300. (§ 1202.4, subd. (d).) In this case, the probation department recommended a $5,000 restitution fine, which greatly exceeded the $300 statutory minimum, and at the sentencing hearing the trial court expressed its intention to double that amount. If Kirincic believed he was unable to pay the $10,000 fine, it was

incumbent on him to object on that ground and request an ability-to-pay hearing, which he did not do.

At the sentencing hearing, defense counsel made only one objection to the fines and fees imposed on Kirincic; counsel requested that the court "stay" the restitution fine in light of the fact that the court was also ordering Kirincic to pay direct victim restitution. The court responded that it could not conceive of a "legal reason not to impose the restitution fund fine." By way of example, the court observed that case law establishes that a person who is sentenced to prison is not thereby deprived of his or her ability to pay a restitution fine. Despite this invitation to articulate a legally valid objection to the restitution fine, defense counsel never claimed that Kirincic lacked the ability to pay the $10,000 restitution fine.[1]

Kirincic mistakenly relies on *Dueñas*, *supra*, 30 Cal.App.5th 1157. Unlike the misdemeanant in *Dueñas*, Kirincic did not dispute his ability to pay his restitution fine or court assessment fees, request an ability-to-pay hearing, or produce any evidence that put his ability to pay at issue. (Compare *Dueñas* at pp. 1162–1163.) This case is distinguishable for the additional reason that *Dueñas* did not involve an above minimum restitution fine. (See *People v. Johnson* (2019) 35 Cal.App.5th 134, 138, fn. 5 [the "distinction between minimum and above minimum restitution fines has consequences for the applicability of [the] forfeiture doctrine"].) Even before *Dueñas* was decided, defendants in Kirincic's position had the right to object to above minimum restitution fines based on inability to pay "because governing law as reflected in the statute (§ 1202.4, subd. (c)) expressly

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[1] The People construe the trial court's remark as a substantive finding that Kirincic did have the ability to pay his restitution fine. We are not persuaded by this strained interpretation of the record. Therefore, we affirm the fines and fees based on principles of forfeiture.

permitted such a challenge." (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.)

DISPOSITION

The judgment is affirmed.

TUCHER, J.

WE CONCUR:

POLLAK, P. J.
BROWN, J.

People v. Kirincic (A155291)